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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 899

MELVIN W. BECK,
APPELLANT,

v

STATE OF MAINE,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
OF THE STATE OF MAINE

APPELLANT'S BRIEF ON APPELLEES MOTION TO DISMISS APPEAL

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TABLE OF CITATIONS

Revised Statutes of Maine, Chapter 81 and 83

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Mobile Jackson vs Miss., 210 US 187

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16 CJS 258 sec. 84

16 CJS 84 sec. 19

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ANSWER TO
STATE'S ARGUMENT NUMBER I

In this argument the state tries to narrow the issue to the limited question of the use of the title "Architect" by the appellant. The state advanced this argument before the Supreme Judicial Court of Maine and the latter, inferentially, disregarded it by considering the constitutional questions raised by the appellant. This view seems to be predicated on the theory that the state may fine and imprison dozens of respondents under an ad-

mittedly unconstitutional statute, if only the issues can skillfully be kept "narrow" enough so that the respondents may not be able to procedurally question the constitutionality of the statute. The state has not, before the state court nor before this court, cited any law to sustain it in this view. We say that this is not the law of the land, nor a proper attitude for a state to take.

The correct rule is stated at 16 CJS 258, section 84, which reads in part as follows:

> "An accused affected by one portion of a statute may not plead the invalidity of another portion of the same statute not applicable to his case, where the invalidity of the portion questioned will not render void the entire act or at least some provision that does affect him adversely; but conversely he may do so where the invalidity of the portion in question would render the entire act or some provision effecting him, void."

And this is the situation in our case. The part of the statute that attempts to describe what is and what is not the practice of architecture is not only vague but disjunctive and in the alternative so as to render the entire chapter void. Elaboration on this score, is reserved for the main brief.

ANSWER TO STATE'S ARGUMENT NUMBER II

Before meeting this argument, the following background is given:

In the state courts the appellant took the position that Chapter 81 was not unconstitutional; that section 9 exempted the appellant, a licensed engineer wholly, from the entire "chapter" per force of statutory definition of the word "chapter" (chapter 10—sec. 22)—(page 8 of the jurisdictional statement). The state said,

"No, the statute does not mean what it says." The courts went along with this view and it is only after it is construed contrary to its expressed terms that the appellant now says the unconstitutionality of the statute arises. The real issue then is that the appellant contends that the statute as written is constitutional and proper but when rewritten, under guise of construing it, is is rendered unconstitutional in its application to this appellant.

> "... Where a state s atute is so construed as to render it open to the objection of repugnancy to the federal constitution, there is presented a federal question authorizing a review."

Mobile Jackson vs. Miss. 210 US 187

The state says that the legislature did not exempt engineers from Chapter 81. The appellant says that the legislature well recognized the constitutional dangers of not exempting licensed engineers from the entire chapter. The only qualification was, under the statute, that the particular licensed engineer be one who "did architectual work incidental to his engineering." This would be recognizing that there are many kinds of licensed engineers, such as chemical engineers, who would not be doing architectual work.

Consequently, they would not be exempt under this statute. Only those who did architectual work incidental to their engineering would be exempt. It is only when the state and the court indulged in the apprehension that the legislature had made mistakes in drafting the act, did the appellant's rights become affected and constitutional problems arose. The appellant says that had his view been adopted, licensed engineers who do architectural work incidental to their engineering, would be wholly exempt from the statute. Other engineers not so engaged, would not be, for obvious reasons.

Therefore, it is the state court's decision construing the statute contrary to its plain and constitutionally proper terms that gives rise to the constitutional problems contained in the questions presented.

The state statute, the state court and the counsel for the state all agree that the appellant may practice architecture incidental to his engineering. This is is a legislative and judicial admission that the appellant is qualified. If he is qualified then saying so could not endanger the public safety, health or welfare. The state insists that the appellant may practice architecture but he may not say so or advertise the same.

The restraint against advertising what you are qualified and permitted to do seems not only to violate the first amendment of the Federal Constitution but additionally is an unwarranted interference with a man's means of earning a livelihood. Advertising is an essential and inseparable part of earning a livelihood in our complex society. Its restrictions should not be indulged in without compelling reason—, much less the tenuous and unsubstantiated apprehensions of the state in this case.

This court has frequently held similar restraints to be unconstitutional abridgements of rights of freedom of speech.

> "The fact that accused could not complain of deprivation of any rights but his own did not preclude him from attacking statute forbidding loitering and picketing with which he was charged with having violated, on ground that the statute was an unconstitutional abridgement of right of freedom of speech."

16 CJS 84 sec. 19

Thornhill vs. State of Alabama 310 US 38

The state also argues that the Supreme Court of the United States has recognized the distinction between those "who act for hire and those who do not." It is respectfully submitted that employees are paid and if they are assigned work of doing architectual design and construction, they are being paid for doing architectual designing and construction. In the final analysis then the supposed basis for differentiation of "those who act for hire and those who do not," vanishes in the light of common sense.

And lastly on this point of argument, the state admits that the appellant may practice architecture incidental to his engineering but he can't say so; he can't advertise the fact by the use of a sign using the word "Architect." It is submitted that this restraint is more likely to protect the income of the registered architects than the general safety, health or welfare of the public.

ANSWER TO STATE'S ARGUMENT NUMBER III

We agree with the rule as stated but point out that it lacks an important recognized qualification.

> "... Where a state statute is so construed as to render it open to the objection of repugnancy to the federal constitution, there is presented a federal question authorizing a review."
>
> **Mobile Jackson vs. Miss. 210 US 1**

> "The Supreme Court of the United States exercises independent judgment in determining whether the statute as construed and applied, violates the federal constitution,"
>
> **Hanover Fire Ins. vs. Carr 272 US 494**

And we infer from the state's argument on this point that it answers in the affirmative, number 3, 4, and 5 of the questions presented.

ANSWER TO STATE'S ARGUMENT NUMBER IV

The state seems to misunderstand the appellant's view on the sixth question presented. The appellant does not complain that "a prejudicial advantage" has been obtained merely. Prejudicial advantages may not encroach on constitutional rights. The appellant here says that his right to due process under the constitution has been infringed.

By way of preface, we submit the following excerpts, in table form, of chapters 81 and 83.

	C. 81 Sec. 8	C. 83 Sec. 2 Sub Sec. II
The Statute defines	Architecture	Engineering
1. Consultation	x	x
2. Investigation	x	x
3. Preliminary studies	x	x
4. Plans	x	x
5. Specification	x	x
6. Contract Document	x	o
7. Aesthetics	x	o
8. Structural Designs	x	x
9. Supervision of Construction	x	x
10. Evaluation	o	x

The state court, in its decision, confirms the only statutory difference between functions of architects and engineers as "...a coordination of structural factors concerning the aesthetic. That element is absent in the engineering law." (bottom of page 17 of jurisdictional statement).

The statute having defined the function of each profession, the state court should not have attempted to rewrite them, much less accept, under guise of "source materials" evidenciary matter which the state now says of it in its argument, the "weight to be given them would appear to be matters within the sound discretion of the

state court." We assume this means evidenciary weight. That means evidence. This evidence was offered and admitted in the appellate court, the appellant not then being present nor required to be; thus having no opportunity to be confronted and to cross-examine, depriving him of his right to due process.

The court, taking advantage of this legal trampoline soars on to say, "Architects are commonly engaged to project and supervise the erection of costly residences, schools... Basic engineering no longer suffices to satisfy the many demands of American health, wealth or prosperity." There is not an iota of evidence in the record to sustain such findings of fact, other than the "source material" which we have seen was evidence in disguise.

Had evidence been offered in the trial court, the respondent could have shown that engineers in Maine are not excluded from the types of projects which the state court inferentially reserved for architects only. And it would have shown that designing of such structures comprises of ninety percent engineering, the remaining ten percent of human effort being the application of aesthetics, or art. The latter depends upon the artistic talent of the engineer, be he called an engineer or an architect. In other words the architect is nothing but an artistic engineer. Or at least so the evidence would have tended to show. In the posture of things, the state takes the view that these moot matters may be decided by an appellate tribunal through source material because they contain "responsible opinions."

The state persists that "... The legislature could reasonably have adopted as a basis for its licensing statute," the substance of the source material, as part of its argument. The fact is, that the state did not adopt any part of such materials because the statute contains no remote reference, to such views. The views it did adopt and enacted into the statute, on this subject, are contained in the table in this brief on page 6.

We must also consider that this is a criminal case. If evidence of this sort is to be introduced not before the trial tribunal but in the appellate courts, in the future, it is submitted that approval of that kind of procedure by the Supreme Court of the United States in this case, will make all source materials in the future, "responsible" by virtue of mere submission in that prejudicial manner. The state says that such procedure does not pose a threat to fundamental freedom. The appellant says that it does. It is not the particular mischief that is done in an individual case that determines unconstitutional infringement but rather the harm or mischief that could be done under the particular law or procedure. This would seem to pose a substantial federal question.

ANSWER TO STATE'S ARGUMENT NUMBER V

The state prefaces this argument with an excerpt from the state court's decision and then buttresses it with the observation that the statute does not unconstitutionally discriminate against professional engineers because, the state says, the law is "designed to prevent fraud and financial loss to individuals from dealings with incompetent persons. . . ." This is followed by the argument that the legislature of Maine concluded that there were "significant differences" between the two professions.

The only significant difference that both the legislature and the state court recognized, in its decision, is "aesthetics." (see table on page 6.) Aesthetics is art. If it is suggested that there are some other differences the state court provided them: the legislature did not.

There is nothing in the statute nor the decision of the state court or even in the present argument of the state suggesting a factual basis for the apprehension that a licensed engineer, already qualified and permitted under the law to practice architecture, even though incidential to his engineering, could practice fraud and

produce financial loss to individuals if he used the title Architect. Nor, indeed, in common sense.

Which is to say, that if the engineer is qualified to practice architecture, he cannot possibly fraudulently mislead those who hire him, to their financial loss by his holding himself out as that, which the state, the court and everyone else admits he is qualified to do.

The last part of the state's argument under this heading cites three cases. The appellant says they have no application to our case, are not in point; the issues raised in those cases not being the issues here.

The case of Herron vs. the City of Denver, 283, P 2d 647, (1955) came up to the Appellate Court of that state for the purpose of construing the Denver Building Code which specifically enumerated various types of structures that architects were authorized to design and supervise the construction of and also specifically enumerated similar areas to which the engineer was to be confined. Of this that court said, "This makes a clear distinction between the types of buildings (each may design and supervise) and the Denver code does not in any way overlap in this regard."

In our case the statute has no such delineation. Not only is there a complete overlapping but, in addition each, architects and engineers, are declared to be competent in each other's field. Obviously then, the issues are entirely different.

In State vs. Babcock 73 NW 2nd 521 (1955) the statute was attacked on the grounds that the definition of the practice of architecture was vague and that there was a delegation of legislative authority. The definition of an architect was stated by the Michigan statute to mean:

> "...a person, who, by reason of his knowledge of mathematics and physical sciences and the principles of architectual design, acquired by professional education and practical experience

> is qualified to engage in architectual practice as hereinafter defined . . . The practice of architecture . . . includes any professional service such as consultation, investigation, evaluation, planning, design or responsible supervision of construction . . . in connection with any public or private structures, buildings, equipment, works or projects wherein the public welfare or the safeguarding of life, health or property is concerned or involved . . . (Emphasis supplied).

We observe that there is no reference to aesthetics. That legislature did not attempt to control art. Furthermore, that statute does not assume that all architectual work necessarily involves public welfare and so it qualifies the premise: if a person designs and/or supervises the construction of a structure and it can be shown that the public welfare is affected, then that person would be violating the statute. However, if it cannot be demonstrated to affect the public welfare or safety then the respondent would not be in violation of the Michigan statute. For instance, if he designed and supervised the construction of a henhouse or doghouse, however large and elaborate, he would not be in violation of the code. In the State of Maine, however, it is not what you design and supervise that matters but it is the mere fact that you have anything to do with designing or supervising construction and the state assumes that no matter what the structure, even a henhouse or doghouse, that public health or welfare is affected, without proof of it.

In the Goldschlag vs. Deegan case, a licensed engineer sought injunctive relief and a writ of mandamus to compel the official in charge of receiving plans for public construction, to receive his plans and specifications for a proposed structure. They were rejected perforce of a statutory provision that only the plans and specifications of architects were to be received for such purposes. He contended, before the New York Court, that the act was discriminatory against engi-

neers. The state court denied relief and the United States Supreme Court denied certiorari.

This case is easily distinguished from ours. What the court held, in that case, in common sense terms, is that anyone, a municipality or state, has the right to insist upon an architect rather than an engineer for proposed work without infringing on anyone's constitutional rights. If the preferance is for an artist to do the work, others cannot complain, not being artists, that they should be hired, too. Also, in the Goldschlag case, it was not an accepted premise that the engineer was either qualified or, under that statute, was permitted to practice architecture, as in our case. We submit that this case, in its facts, or the issues tried, is not in point.

This is particularly true when we consider that in a case seeking injunctive relief of mandamus there is a tremendous burden of proof and of going forward with the evidence imposed upon the plaintiff. In our case, a criminal case, the state has the burden of proof and a large one which must be met in full if the constitutional rights of this appellant are to be protected.

It is respectfully suggested that the State's Motion to Dismiss should be denied and the case be retained for full argument on its merits.

Respectfully submitted.

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